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Supreme Court of the United States

October Term, 1953

No. 274

COMMERCIAL PICTURES CORPORATION,
Appellant,

vs.

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLEES

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLEES

Statement of the Case

This proceeding was brought under Article 78 of the New York Civil Practice Act to review the determination and order of the appellee, the Board of Regents of the University of the State of New York, affirming the decision of the Director of the Motion Picture Division of the New York State Education Department in refusing to issue a license for the exhibition of a motion picture film entitled "La Ronde".

The Appellate Division and the Court of Appeals of the State of New York, confirmed the determination of the appellees (two Justices dissenting) (R. 48), the Court of Appeals affirmed the order of confirmance (two Judges dissenting) (R. 56).

The prevailing and dissenting opinions of the Appellate Division are reported in 280 App. Div. 260 at pages 260 and 264, and appears at pages 48-55 of the Record.

The prevailing, concurring and dissenting opinions of the Court of Appeals are reported in 305 N. Y. 336 at pages 339, 349, 355 and 366, and appears at pages 56-85 of the Record.

The Statute

The statute under attack is Article 3, Part II (§§ 120-132) of the New York Education Law, which is reproduced as Appendix A to this Brief.

Under the statnte, all motion pictures to be exhibited within the State, for entertainment purposes in public theatres where admission fees are charged, are required to be submitted to the Education Department, which must issue a license therefor "unless such film or a part thereof is * * * immoral, * * * or would tend to corrupt morals * * *" (New York Education Law, § 122).

Thus, only motion pictures which are to be shown for entertainment purposes in public theatres where admission fees are to be charged, are under consideration here.

The determination of the Board of Regents, in respect to the denial of a license must not be arbitrary or capricious, and is subject at all times to review by the courts under Article 78 of the New York Civil Practice Act.

The Issues

Concisely stated, the questions before this Court are:

1. Is it unconstitutional for the people of New York State to prohibit the exhibition of immoral pictures and to set up an educational agency (viz: the Board of Regents) to screen pictures before exhibition in order that immoral pictures may be recognized and excluded?

2. If such a statute is constitutional does the New York State statute meet the standards laid down in the *Burstyn* case (*Matter of Burstyn, Inc.* v. *Wilson*, 278 App. Div. 253, 303 N. Y. 242, rev. 343 U. S. 495)?

The Facts

The motion picture film "La Ronde" (Revised) was presented to the Motion Picture Division for review and licensing on April 13, 1951. It was the unanimous decision of the motion picture reviewers that the film was "immoral" and would "tend to corrupt morals". Under date of April 13, 1951, the appellant was notified of such decision and a license denied (R. 29). Thereafter, on or about April 16, 1951, the appellant appealed to the Board of Regents (R. 27). An answer, verified April 20, 1951, was filed by the Director of the Motion Picture Division. The said motion picture film was reviewed on May 3, 1951, by a duly constituted committee of the Board of Regents consisting of Messrs. Macy, Brosnan and Holtzman. After full discussion and consideration said committee on May 25, 1951, rendered its decision that the film was "immoral" and its presentation in motion picture theatres "would tend to corrupt morals" within the meaning of Section 122 of the Education Law (R. 31). The Board of Regents on the same day confirmed the action of the committee and dismissed the appeal (R. 32).

Thereafter, this proceeding was commenced.

The Story of the Film

From the beginning to the end the one theme of the film is promiscuity and seduction.

The motion picture presents a chain of loosely related sequences, each dealing with the amorous adventures of various characters, one partner in each escapade becoming the principal in the next. It is a series of interlocking love affairs held together by a mythical master of ceremonies. The cycle commences with an encounter between a prostitute and a soldier who is hurrying back to the barracks when he is accosted. The prostitute's room is ten minutes' walk away and since the soldier's time is limited, they take advantage of the local environment. His initial hesitancy is overcome by her assurance that it's civilians who pay; for boys like him "it" is free. The cycle continues with the soldier and a chambermaid; the chambermaid and the son of her employers; the son and a married woman, the married woman and her husband; the husband and a girl; the girl and a poet; the poet and an actress; the actress and a count, and last of all the count and the same prostitute. The cycle is completed with the soldier saluting the count.

Each scene is the same; the meeting at which sexual intercourse is offered and accepted; the scenes leading up to the act are depicted; the act itself is grudgingly blacked out.

Summary of Argument

I. This Court in *Matter of Burstyn, Inc.* v. *Wilson*, 278 App. Div. 253, 303 N. Y. 242, rev. 343 U. S. 495, held that motion pictures are subject to the protection of the First and Fourteenth Amendments of the Constitution of the

United States, but did not hold that prior examination of motion pictures was unconstitutional.

II. The New York State statute is clear and concise, and requires that all motion pictures be licensed (eliminating language not here germane) unless they are "immoral" and "would tend to corrupt morals".

III. The words "immoral" and "would tend to corrupt morals" are definite, are not ambiguous, and have been judicially construed innumerable times. There may be many acts allegedly immoral, but unlike the terms "sacrilegious" which, as the Court said, meant different things to different people, this term means the same thing in all respects to the majority of our people.

IV. The State may prohibit the exhibition of an immoral picture. In so doing, the State may set up a screening agency to cull out those pictures which are immoral.

V. The Board of Regents in New York State is an "ideal" agency in which to entrust such duty.

VI. The State examination settles for the entire State the issue of immorality. Otherwise, the owner of the picture may find it necessary to initiate dozens of separate litigations. New York State Courts have held that where the State acts, localities are bound thereby, thus establishing one standard for the entire State.

VII. State examination eliminates any necessity for licensing motion picture theatres with procedures for revocation of license if such theatres exhibit immoral pictures.

VIII. In the face of reports indicating expansion of juvenile delinquency and the uprising of sex offenses, any letdown or abandonment of present standards is exceedingly dangerous.

IX. Local injunctions or criminal prosecution is pre-censorship, for it prevents further exhibition. Nothing is gained by multiplying pre-censorship boards by the number of localities of the State.

I

The opinions of the New York State Court of Appeals and the Appellate Division.

In this brief we shall not attempt to reemphasize the opinions of the Court of Appeals of New York in respect to the statute. The opinions are as potent a brief as can be written showing the clear constitutionality of the statute. The opinions upholding the constitutionality of the statute were written by the Court after exhaustive study of the case for several months and into such opinions went the most careful reflection and thought of the members of that body. We regard it as redundant to reemphasize the conclusions of that Court and this brief is intended only to supplement, if possible, such conclusions.

II

It is not unconstitutional for the People of New York State to prohibit the exhibition of immoral pictures and to set up an educational agency to screen pictures before exhibition in order that immoral pictures may be recognized and excluded.

This Court in the Burstyn case (*Matter of Burstyn, Inc. v. Wilson*, 343 U. S. 495) has settled certain issues with respect to motion picture censorship. It held that the exhibition of motion pictures, like newspapers and other expressions of news and opinions, are subject to the protec-

tion of the First and Fourteenth Amendments of the Constitution of the United States. It did not, however, determine that motion picture censorship was prohibited by these provisions, but stated that under a properly drawn statute an area existed where pre-censorship would be constitutional. It concluded that the term "sacrilegious" was ambiguous in that it meant different things to different people in every instance where used. The Court, having come to that conclusion, covered no other phase of the matter.

The Picture Portrays Nothing but "Immorality"

As has been outlined, *supra*, the picture has but one theme. It deals with promiscuity and seduction. The entire sequence of scenes is built around promiscuity and seduction. Promiscuity, seduction, adultery. Ten separate scenes of the same. Nothing else. This is the picture that the Board of Regents has concluded is "immoral". As a matter of fact the Penal statutes of the State had labeled such acts immoral and prescribed penalties for their breach.

Of the ten scenes in this film, two depict action which involves violations of the Penal Law of the State of New York, dealing with adultery (§§ 100-103, under which penalties of up to six months in a penitentiary or county jail and up to $250 are provided); two of the other scenes depict action which involve violations of Penal Law Sections 1146 (misdemeanor), 2460 (felony, up to 25 years and $5000), and 1140-a (misdemeanor). Five of the remaining six show violations of Penal Law Sections 2175-2177 (penalties up to five years imprisonment and $1000 fine).

It must also be noted here that the book which the film follows very closely (Arthur Schnitzler: "Der Reigen")

was found to be morally objectionable in 1932 by the New York State Courts (*People* v. *Pesky*, 230 App. Div. 200, aff'd. 254 N. Y. 373).

It might also be pointed up that appellees agree with the view that a film may not be barred merely because it shows illegal or immoral acts, such as the customary detective plot which shows a killing or other transgression. In such themes the predominant thought is law enforcement, or it may be a portrayal of the reaction of human nature caught in the web of fate. But La Ronde does not fall into any such category. With all the "exquisite handling of the licentious", the film, nevertheless, is "without a single redeeming feature". The sequences are nothing but "studies in the etiquette of the liaison and all its nuances". "There * * * [is] * * * no attempt to point to any lesson that might be of value to anyone that would * * * [see] it. * * * The facts show that the whole * * * [film] deals with the sensual. It has no other object or purpose." (*People* v. *Pesky, supra*). The most vicious feature of the film, which was not contained in the original book, and which makes the film, therefore, much more objectionable than the book, is the closing statement of the "Master of Ceremonies", claiming that the film portrays that which everybody is doing ("C'est l'histoire de tout le monde").

It is interesting to note that the critical reviews including those cited by appellant point out the absolute immorality of the film.

We quote first from the Films in Review*, the publication of the National Board of Review of Motions Pictures, Inc.:

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* Films in Review, Vol. 1, #7, October, 1950.

"France

"The French presented a film called La Ronde (The Carousel) which, should it ever be shown in the States, will be tagged as essentially Gallic in its taste, its humor, and its theme. The theme of the film is simply and honestly that everybody, from the soldier to the married woman, from the maid to the successful playwright, *is fundamentally promiscuous.* Very few censors in the world will accept it, and the film is likely to be banned in many a country. *Produced by some State Health Department, La Ronde could have made a frightening documentary on how venereal disease spreads.* It was written by Jacques Natanson from Schnitzler's polemic and scandal-mongering play of the German 1900's, directed by Max Ophuls, and produced by Sacha Gordine. The tenuous charm and subtle humor of the dialogues and the deftness of the director save it from the vulgarity such a theme could hardly avoid. The acting of practically all the featured actors (the entire eleven of them) is admirable, except, strangely, for Jean-Louis Barrault and Gerard Philipe, who are ill at ease and look it. The only question remains: is it worth such an act of courage and defying censorship, when the result comes out such a brittle film though amusing and dreamlike? Ophuls himself seems to have tired of all this passion without love; *La Ronde* which starts out in such a firework of subtlety, taste, and sparkling psychology *bogs down after a while, and the last three episodes, out of repetition of situations, lose humanity, imagination and understanding of its own theme.*" (Emphasis supplied.)

We quote from Dorothy Kilgallen's Column ("Gossip in Gotham") New York Journal American *

"A verree, verree, naughtee French film called 'La Ronde' may get into this country and receive the censor's okay stamp via the simple device of misleadingly innocent English subtitles. * * * Only customers who understand French will catch the stretches of shocking dialogue."

* New York Journal American, August 9, 1951.

We quote from appellant's exhibits

"one cynical lesson and nine easy seductions" (R. 9; London Daily Mail, April 27, 1951)

"The details are complete enough to make one blush, unseen, yet abstract enough to rise above the purely *pornographic, which they are.*" (Emphasis supplied.) (R. 11; Los Angeles Times, September 21, 1951)

"When Americans speak of romance, they have quite a difference concept of it than Europeans. * * * The difference seems to be that the French (and the Viennese) think of love as sex and of sex as already a fait accompli while with us it lies in the future as something still to be attained." (R. 11; Los Angeles Times, September 21, 1951)

"With something less than tremulous delicacy, he and his associate artists, speak quite freely upon the joys and woes of amorous adventure." (R. 13; The Evening Star, Washington, D. C., July 28, 1951)

"The fact that it is about love, in French, * * * assures 'La Ronde' an unwavering quality of attention. * * * As the facts of life go in this airy area of the Western hemisphere, only prostitutes and soldiers are likely to know about how it is to be a prostitute or a soldier. The same is true of sons of aristocratic households financially able to employ attractive maids such as Simone Simon." (R. 14; The Evening Star, Washington, D. C., July 28, 1951)

"The play is full of observations made in the deftest theatrical terms—on the marriage bed, on the erotic difficulties involved in wearing a sword, on the trepidation of youth in the boudoir, on the nuisance of champagne corks which break off at inopportune moments, on the frustration of a lady who asks about a place of rendezvous: 'Have other women come here?' Her devoted student replies: 'This house was built fifty years ago.' * * *" (R. 10c; Newsweek, October 22, 1951)

The picture is, hence, immoral and has been found so, as a matter of fact, by the Regents and the Courts of the State.

Immoral Pictures May be Prohibited

As a matter of law this statement is so obvious that we do not belabor this point here. We think that if a sovereign State is without power to control a media of expression when such media is portraying adultery, seduction, fornication and prostitution, this country has indeed fallen upon evil days. The Courts have held many times that the prohibition of the exhibition of immoral and indecent matters in the press, in pictures, etc., may, without question, be stopped and those guilty thereof punished.

Pre-examination of Pictures in Order That Immoral Pictures May be Recognized and Excluded is Not Unconstitutional

It must be also recognized that the actual showing of a picture does not change its status. If a picture which is immoral can be prevented from being shown at all, some agency must make that determination. In New York State the Legislature has chosen to place such task in the hands of the Board of Regents, which is the top educational agency in the State. The pictures must be exhibited to them, and they then must make their determination. When the Regents have acted, they have acted for the entire State. If the Board of Regents were not authorized so to act, then the pictures would be run in the various motion picture theatres in the State and some police agency would need to act—a different police agency in each locality. The effect of licensing with prior review or criminal prosecution after one or two showings is the same because after criminal action future presentation is likewise barred by the imminence of further criminal prosecution. The only difference is that the picture may not be run at all if the licensing authority finds it to be immoral, and it may run once or twice if the problem is left to the local policing authorities. There is no issue as to whether there should be prior-examination,

because if it can be banned at all such banning would always be censorship restraining any subsequent showing. The only difference between the Regents acting for the entire State and a local police agency acting separately and independently in various localities is the one or two showings involved and the possibility of some policing authorities being at variance with other policing authorities in their conclusions. It must be borne in mind that if the movie is barred, there is a Court review available.

It is recognized that motion pictures present problems peculiar to that media of communication. *Matter of Burstyn, Inc.* v. *Wilson*, 278 App. Div. 254, aff'd. 303 N. Y. 242, rev. 343 U. S. 495. When prosecutions are instituted for possessing or selling obscene or immoral publications, a single issue, picture or article may be involved, but with a motion picture which is exhibited in its entirety to mass audiences all future presentations will be prevented by the imminence of further criminal prosecution.

In *Pathe Exchange, Inc.* v. *Cobb*, 202 App. Div. 450, 456, aff'd. (without opinion) 236 N. Y. 539, Mr. Justice Hinman, writing for the Appellate Division, said:

> "We cannot say that the moving picture is not a medium of thought but it is clearly something more than a newspaper, periodical or book and clearly distinguishable in character. It is a spectacle or show rather than a medium of opinion and the latter quality is a mere incident to the former quality. It creates and purveys a mental atmosphere which is absorbed by the viewer without conscious mental effort. It requires neither literacy nor interpreter to understand it. Those who witness the spectacle are taken out of bondage to the letter and the spoken word. The author and the speaker are replaced by the actor of the show and of the spectacle. * * *
>
> "Our public libraries are filled with books not commonly read because the author has not caught the at-

tention of the public without which the book becomes a dead letter. * * * But the moving picture attracts the attention so lacking with books or even newspapers, particularly so far as children and the illiterate are concerned, and carries its own interpretation. It needs no other illumination than the bright light behind the film which moves so rapidly that it reproduces the life of the world as it in fact exists and as it is portrayed in fiction, the evil as well as the good. Its value as an educator for good is only equalled by its danger as an instructor in evil. 'He who runs may read' the thought purveyance of the moving picture. The child soon becomes sophisticated, as he attends this school of experience, where current events may be revealed in all their nakedness, where the pictorial drama may illustrate the experiences of mankind, the good and the bad, where character may be shaped most readily the one way or the other according to the sentiments conveyed. The actors in the picture become in fact the associates of the child as effectually as though they were their living and breathing companions, so realistic is the picture, so perfectly photographic of real life. Nothing is left to the imagination as with the printed page. The picture creates its own atmosphere so vividly, so attractively, that even the child and the illiterate adult may see and learn. * * *"

The motion picture theatre is generally entered for the purpose of entertainment, diversion, relaxation and amusement. The "double feature" is the rule rather than the exception and it is rare that the customer buys the ticket of admission for the express purpose of seeing both features. In relation to at least one of the features presented, the audience is generally in effect a "captive audience." The average person will not leave a motion picture theatre during a performance, and children most certainly are not likely to do so. No other medium of expression operates under such circumstances. A television set can be turned off or switched to another channel instantaneously by a parent, as can a radio set. In addition, the large motion

picture screen, with its brilliant colors and sharp clarity of sound and picture, and the darkened assembly of strangers, away from home, is a much more potent medium than television with all its present limitations, or indeed any other medium presently known.

In considering with respect to this picture the so-called "present danger rule" (*Schenck* v. *United States*, 249 U. S. 47), we have first the overall question as to whether the State may properly ban immoral pictures, and, second, if the answer to the first question is yes, then is there a Constitutional block to trusting such power to the Board of Regents as opposed to placing the same in the hands of the local police authorities?

This Court in the Burstyn case (*Matter of Burstyn, Inc.*, v. *Wilson, supra*) upon which our opponents rely, has stated that "liberty of expression by means of motion pictures" while guaranteed by the First and Fourteenth Amendments was not "absolute freedom to exhibit every motion picture of every kind at all times and all places". Mr. Justice Clark continued, pointing out that motion pictures are not "necessarily subject to precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems." In other words, the Court has held innumerable times that where there is a "clear and present danger", it is wholly within Constitutional authority for the State to eliminate the occurrence before it happens. See in particular:

Schenck v. *United States, supra;*
Gitlow v. *New York*, 268 U. S. 652;
Terminiello v. *Chicago*, 337 U. S. 1;
Chaplinsky v. *New Hampshire*, 315 U. S. 568;
Near v. *Minnesota*, 283 U. S. 697;
Winters v. *New York*, 333 U. S. 507.

Some of the reasons for the necessity of such pre-censorship may be summarized as follows:

(1) Juvenile Delinquency

If there ever was a time in the history of the United States when a need existed for some supervision of indecent and immoral exhibitions of motion pictures, it is now. It is quite unnecessary to remind the Court that the problem of juvenile delinquency is an all-embracing one in which newspapers, social organizations and governmental agencies, including the Senate Judiciary Committee*, are evincing great concern. An article** discussing the extent of juvenile delinquency and its increase indicates that one primary cause of the sexual stimulation (erotic response) is watching motion picture productions. Here concretely we have a very definite basis which brings the rule of "present danger" laid down by this Court into clear perspective. Is it safe in the light of the present increase of juvenile delinquency to give *carte blanche* to a motion picture theatre to exhibit any picture without some prior examination to guard against an obscene, lewd, lascivious or immoral spectacle? Is this any different from saying that narcotics or liquor shall not be sold to minors? New York State answers all these questions in the negative.

(2) Needs of the Decent Citizen

We have already touched upon the problem of juvenile delinquency. The problem is not confined to juveniles.

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* The Senate Judiciary Committee is presently holding hearings on Juvenile Delinquency. One of the objectives of the Committee is "To determine the extent to which means of general public communication such as comic books, television and radio and other visual media affect the rate of juvenile delinquency". Social Legislation Information Service, Issue #23, 83rd Congress, 140.

** Platform, September 1953, page 15, published by Newsweek's Club and Educational Bureaus.

The Court is well aware that there are many people who are attracted to depraved exhibitions in movie theatres and who are influenced because of them to commit acts of moral degeneracy and crimes involving moral turpitude. All records indicate that pictures of this type are a bad influence. Furthermore, we must not forget that the decent citizens who make up the bulk of a movie audience, such as the youth who takes his girl to the theatre, or a family enjoying an evening out, object to being subjected to off-color and indecent entertainment.

(3) Existence of Motion Picture Code No Substitute for Pre-Censorship

After New York State and other states determined upon the necessity or pre-examination of motion pictures, Hollywood determined to have a moral code of its own. We have never been too clear as to whether this code was set up in an attempt to offset the existence of the motion picture review boards or whether the industry really was trying to keep its own house clean because of its own high motives. In any event, Hollywood secured the services of the then Director of the Motion Picture Division of the State of New York, James Wingate, who was instrumental in setting up the code. The existence of such code has been cited as an answer to the need for pre-examination of motion pictures by State agencies. The fact that the code was set up after the State agencies were established, and models its code upon the standards of such agencies, is no guarantee that such code will continue to exist if the agencies were abolished. In any event, the records of New York State indicate that at least 50% of the pictures which are examined by the review board are foreign pictures or pictures which are not subject to the jurisdiction of such a code. The existence of such

code can in no way be considered as a substitution for the service rendered by these boards.

(4) People of New York State Believe in Necessity For Pre-Censorship

The statute (article 3, Part II (§§ 120-132) of the New York Education Law) is not on the books because of "holier than thou" efforts on the part of reformers. It is there as the considered act of the unanimous viewpoint of the Legislature, backed by the solid citizenry of the State. In other words, it is the consensus of opinion of a vast majority of New York State citizens that there is a substantial basis, be it called "present danger" or anything else, for the existence of this statute. The proof of this came about some ten years ago when an attempt was made to repeal the statute. The bill to repeal this statute developed no support for the proponent. On the contrary, we think there were very few persons who were not represented on the side of continuance of the statute. The following groups filed a very strong opposition, both orally and in writing, at a hearing before the Legislative Committee considering the bill to repeal the statute:

New York State Congress of Parents & Teachers
Women's Club of the State
League of Women Voters
Association of University Women
Catholic Church
The Federation of Churches of Christ (Protestant)
State Teachers Association
Girl Scouts of America
Y M C A

We have no doubt that these people had particularly in mind indecent and immoral pictures, and we think that we

have almost practical unanimity of thought among the citizenry of this State with respect to such matter.

Most recently and on October 26, 1953, in New York City on the television program "Let's Take Sides"* there was a moderator with a panel of so-called "experts", who argued various aspects of the problem. At the conclusion of the program a vote of the audience was taken on the question as to whether there should, or should not, be censorship of motion pictures. The audience was a run-of-the-mill group. The applause meter eloquently indicated that the audience was very substantially in favor of censorship. The facts were debated, and that censorship received audience approval is significant.

(5) Local Supervision Is Inefficient and Ineffective

Nor do we think there is any answer to this problem in abandonment of a State agency and the substitution therefor of local agencies. If there is an evil in censorship, it is certainly accentuated through this latter process. The functioning of the State agency eliminates the need for continuous harassment of motion picture producers in each locality. As a matter of fact, in New York State the Courts have held that as long as a picture has a license from the State agency, a local agency may not interfere with its exhibition. See *Burstyn, Inc.* v. *McCaffrey,* 198 Misc. 884. (See also Penal Law, Section 1141, subdivision 1)

Let us visualize briefly what would happen if a motion picture company has the right to exhibit any picture in New York State without pre-examination. New York State is a polyglot state. It has hundreds of people belonging to every race and every creed. It has within its confines the

* (WNBT, Channel 4, NBC Network.)

most rural areas and the most urban. It has within its borders the most strict constructionists and the loosest. It has in it those people who see evil in almost everything, who spend their lives criticizing others for their ways of life which by accepted standards are not unlawful or improper. On the other hand, it has many freethinkers who see no evil in anything, who read only artistry into moral depravity, who would subject their fellow citizens to the worst in life on the theory that it represents acceptable conduct. Any generally accepted moral code of a people does not embrace the extremes of either end. It is a code which is accepted by the thousands of solid citizens of the State. The theory behind the State establishing an organization which can conduct research into what that code consists of, what the people generally believe is standard good moral conduct, what the consensus of opinion of the whole State is and not what a small segment thinks, is coordinated by the Motion Picture Division under the supervision of the Board of Regents. This division devotes its whole time to that problem. This Court does not have before it any protests of the motion picture industry or any protests from any responsible group which criticizes this office as being too pedantic or too lax. The division has been in operation since 1927. Cases have been brought to the Courts of New York State where it has been alleged that the Regents have been arbitrary and capricious, and no Court in New York State at the time the license for this picture was refused had ever come to that conclusion. To substitute for such a record an untrained body in each of the thousands of areas of the State, to subject the motion picture producers to innumerable lawsuits and the delay that is involved over the exhibition of their pictures, is inefficient and costly.

It is so well recognized in the State that if there were no State body a chaotic condition would result and some motion picture houses would cater to the salacious, that the necessity for licensing motion picture houses and immoral pictures would then be necessary. This places a serious responsibility upon the owner of the picture house because it is often times difficult for him to know in advance the content of the picture which he books. For the same reason he might well find himself confronted with a penal violation because he had no way of knowing in advance whether he was violating the moral code through the exhibition of the picture. It is not only much more effective to eliminate the danger of the exhibition of immoral pictures to pre-examine them but it is also fairer to the motion picture producer because he knows in advance the standards which will be applied by a particular state and he can govern himself accordingly in expenditure of money for footage and it is also fairer to the theatre owner because he knows that if he exhibits a picture which has a state license he is fully protected, whereas if he does not have the protection of licensure, he exhibits each and every picture at his peril.

(6) *It Eliminates Local Pressure Groups*

If motion picture censorship is left to each individual community the officials therein will be immediately subjected to pressures to bring injunctive relief against a picture because of all sorts of motives including religious ones. As heretofore indicated, once a picture is licensed by the State it is not subject to such pressures. The exhibitor has the legal right to exhibit it even though groups in some areas may have certain aversions to its showing.

(7) *Laxity and Inertia on the Part of Some Officials Is Notorious*

If it be conceded that the showing of an immoral picture is harmful, then the sooner that it is eliminated the better. There is no assurance unless there is state censorship of such pictures, that in the very places where they will do the most harm the officials will take the necessary steps to eliminate them.

(8) *The Time Lag In All Instances Presents a Present Danger*

If a picture is exhibited to the public before it can be censored the time lag between the exhibition and the injunctive relief may cause irreparable damage.

(9) *Artistic Quality of film increases "clear and present danger".*

Much is made by appellant of the quality of the presentation of this motion picture. But outstanding performers, perfect acting; tunes, now nostalgic, now spritely; brilliant scoring, cueing and staging—all these merely make the pill more palatable; merely intensify the effect of the basic tenet of the film "C'est l'Histoire de tout le monde"; "It's the story of everyone",* on the young and impressionable mind. The danger becomes more "clear and present", as the persuasiveness of the theme is increased through the quality of presentation. Had the apple in the Garden of Eden not been so attractive, Eve would not have eaten it.

* Final line of dialogue.

(10) *Motion pictures are a very potent medium of mass communication with the power of creating a clear and present danger.*

The recognition of this potential influence of motion pictures for good or evil is recognized throughout the world as evidenced by the special legislation enacted in various countries to control motion pictures. (See Reports on the Facilities of Mass Communication UNESCO Publication 899). The United States maintains an active interest in the use of motion pictures as propaganda. Among such functions is the motion picture division of the Voice of America. In determining the existence of a clear and present danger the impact of a film must be judged in its long range as well as its immediate effect. A picture which with wit and finesse glamorizes immorality most assuredly encourages not only a disregard for moral standards but also an approval for immoral acts. A breakdown of moral concepts surely presents a clear and present danger.

III

The New York statute meets the standards indicated in the Burstyn case in order that a statute providing for pre-examination of motion pictures be constitutional.

In order to meet the standards prescribed for a statute providing for pre-censorship of motion pictures, this Court has indicated that the statute must be clear and properly drawn. The New York statute, we think, is as clear as it can be possibly made, and provides a scheme in which all parties are fully protected. In the first place, the statute requires that all pictures be licensed (eliminating language not germane here) unless they are immoral. Those who attack this statute try to spell out a conclusion that the term "immoral" is not understood and is too broad.

Some comfort is attempted to be derived from the decision of this Court in the *Burstyn* case, *(Matter of Burstyn, Inc. v. Wilson*, 343 U. S. 495), where the Court held the term "sacrilegious" to be undefinable, because as the Court said, it means different things to different people. Care must be exercised in giving consideration to the term "immoral", not to be led astray from the fundamental issues involved. The term "sacrilegious" was held to be ambiguous. Such is not the fact with the term "immoral". There are commonly accepted standards of morality which are known and understood by all. In particular, there is no disagreement throughout the State in respect to sex immorality, which is the specific problem before the Court in this case. The appellees would have the Court eliminate the term "immoral", not because the people of the State do not know what the term "immoral" means with respect to sex, but because there may be other acts, the immorality of which may or may not be clearly definable. It is the position of the appellees that the primary meaning of the term "immoral" is the very one with which we are dealing, and that there can be no disagreement as to its concept. Consequently, for the purposes of this case, under no stretch of the imagination can the word be termed ambiguous. Furthermore, the Courts have had reason innumerable times to construe the term, and the Courts since the creation of the United States of America have not seemed to have any great difficulty in knowing what the word means. The Appellate Division in this case had no trouble with it, the Court of Appeals had no trouble with it and this Court in *Swearingen* v. *United States*, 161 U. S. 446, had no trouble with it.

The Legislature of every state of the Union has used it innumerable times, always referring to sex immorality. The Penal Law of the State of New York utilizes the term "immoral" or "tend to corrupt morals" in no less than

eighteen places to our best count. See Penal Law, § 483-a, § 483-b, § 485, subd. 5 § 485-a, subd. 5, § 486, subd. 3, § 494, § 1140-a, § 1141, § 1141-a, § 1145, § 1147, § 1290, subd. 4, § 2460, subds. 1, 2, 3, 5 and 6, and § 1944-a. See also Penal Law § 483, § 484 and § 1530, and General Business Law § 190 and § 191, subd. 3.

It is further to be noted that under the provisions of the Education Law of the State of New York it is required that each person before being licensed to practice any profession must be of good moral character, and in all cases the license can be revoked if it is shown that the person so practicing is not of good moral character. See Education Law, § 6506, subd. 2, § 6608, subd. 1(b), § 6704, subd. 1(b), § 6803, subd. 1(b), § 6905, subd. 1(b), § 7005, subd. 1(b), § 7105, subd. 1, § 7123, subd. 1(a) (1), § 7205, subd. 1(c) and 2(c), § 7304, subd. 1, § 7404, subd. 1, and § 7502. This is also particularly true of the teaching profession where, from time immemorial, the statute has contained provisions whereby the license of a teacher may be summarily revoked upon evidence of immoral conduct. See Education Law, § 305, subd. 7, and § 308. See also Education Law, § 3012, subd. 2, and § 3013, subd. 2.

While the foregoing statutory citations of the use of the terms "moral" and "immoral" are references to New York statutes they are intended merely as illustrations. The statutes of every one of the states as well as the federal statutes are replete with the same or similar terms.

The Supreme Court of the United States in *Swearingen v. United States*, 161 U. S. 446, 451 said:

> "The words 'obscene,' 'lewd' and 'lascivious,' as used in the statute, * * * signify *that form of immorality which has relation to sexual impurity*, and have the same meaning as is given them at common law in prosecutions for obscene libel. * * * [To fall into

this category the subject matter must be] * * * of a lewd, lascivious and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall." (Emphasis supplied.)

Further, it should be noted that in *Mutual Film Corp.* v. *Industrial Commission of Ohio*, 236 U. S. 230, the court determined that the language of the licensing statute thereunder consideration in which the terms "educational, moral, amusing or harmless" were used provided a sufficient standard and that such terms, "like other general terms, gain precision from the sense and experience of men and become certain and useful guides in reasoning and conduct." This holding was not overruled by the Burstyn case, (*Matter of Burstyn, Inc.*, v. *Wilson*, 278 App. Div. 253, 303 N. Y. 242, rev. 343 U. S. 495) since the court in the Burstyn case passed only upon the term "sacrilegious." Except for the term "moral" the terms of the Ohio statute under consideration in that case are much more general terms than those of the statute in the case at bar.

The courts in New York State have dealt with the word "immoral" and various similar words such as obsence and indecent in the following cases in which it is apparent that the Court, without parental legislative guidance, has been thoroughly able to understand and define the words in question. Concerning the Penal Law: *People* v. *Muller*, 96 N. Y. 408; *People* v. *Wendling*, 233 App. Div. 704, 258 N. Y. 451; *People* v. *Eastman*, 116 App. Div. 922, 188 N. Y. 478; *People* v. *Winters*, 268 App. Div. 30, 294 N. Y. 545, rev. 333 U. S. 507; *Halsey* v. *The New York Society for the Suppression of Vice*, 191 App. Div. 245, 234 N. Y. 1; *People* v. *Eagle*, City Magistrates' Court of the City of New York, November 24, 1952, N. Y. L. J., Vol. 128, No. 110, December 9, 1952; *People* v. *Pesky*, 230 App. Div. 200, 254 N. Y. 373 (upholding a conviction under Penal Law § 1141, for pos-

sessing with intent to sell or show an English translation of the book from which the film "La Ronde" is derived).

Concerning the Domestic Relations Law; *In re Brenner's Will*, 44 N. Y. S. 2d 447, aff'd. 52 N. Y. S. 2d 792; *Hoops* v. *Hoops*, 266 App. Div. 512, rev. 292 N. Y. 428; *Matter of Haverly*, 180 Misc. 16. In addition, of course, there are the cases concerning the enforcement of illegal or immoral contracts.

The Federal courts in passing upon the statutes concerning customs have dealt successfully with the word "immoral" in construing Title 19 U. S. C. § 1305 in the following cases: *United States* v. *One Book Entitled "Contraception"*, 51 F. (2d) 525; *United States* v. *One Book Entitled "Married Love"*, 48 F. (2d) 821. In addition, the courts of our sister states have also successfully determined the meaning of the word "immoral": *Orloff* v. *Los Angeles Turf Club*, Cal. App., 208 P. 2d 987; *Jones* v. *Poole*, 62 Ga. App. 309; *In re Hicks*, 163 Okl. 29; *Moore* v. *Strickling*, 46 West Va. 515; *Grievance Committee* v. *Broder*, 112 Conn. 269.

We think what the appellant is getting at in attempting to attack the term is not that it is ambiguous, but that it is too broad and covers other areas beyond sex immorality. In the first place because the Court of Appeals has limited the meaning of the statute to sex immorality and the Appellate Division recently following that decision has refused to open up the term to any other meaning. (See Matter of Broadway Angels, Inc. v. Wilson, ... App. Div. ...., decided November 18, 1953), this claim is, therefore, academic, but even assuming that there is any basis at all for their position this Court has in many instances indicated that the requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas

which find adequate interpretation in common usage and understanding. "The use of common experience as a glossary is necessary to meet the practical demands of legislation". *Sproles* v. *Binford*, 286 U. S. 374, 393.

In *Boyce Motor Lines* v. *United States*, 342 U. S. 337, 340, the Court said, "But few words possess the precision of mathematical symbols, most statutes deal with untold and unforeseen variations in factual situations and the practical necessity of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently no more than a reasonable degree of certainty can be demanded."

In *Jordan* v. *DeGeorge*, 341 U. S. 223, there was before the Court a statute in which the language "crime involving moral turpitude" was used. The Court said at page 231, "* * * difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a state unconstitutional for indefiniteness. * * * Impossible standards of specificity are not required. * * * The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."

In *Bourjois Inc.* v. *Chapman et al.*, 301 U. S. 183, a statute of the State of Maine was challenged, which statute prohibited the sale of cosmetic preparations which in the judgment of administrators contained injurious substances in such amounts as to be poisonous, injurious or detrimental to the person. It was held that the statute was sufficiently definite, and that due process was amply safeguarded, particularly in view of the provision for appeal to the courts from the determination of the administrative agency.

In *Miller* v. *Strahl*, 239 U. S. 426, the statute under consideration required the proprietor of a hotel in the event of fire "to do all in his power" to save guests and inmates of the hotel. The Court held the statute valid and said at page 434, "* * * Rules of conduct must necessarily be expressed in general terms and depend for their application upon circumstances and circumstances vary * * *. It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program. 'If Congress shall lay down by legislative act an intelligible principle—such legislative action is not a forbidden delegation of legislative power'." (*Lichter* v. *United States*, 334 U. S. 742; *Hampton & Co.* v. *United States*, 276 U. S. 394; *Knauff* v. *Shaughnessy*, 338 U. S. 537. See also *Bandini Co.* v. *Superior Court*, 284 U. S. 8; *Omaechevarria* v. *Idaho*, 246 U. S. 343; *Louisville Bridge Co.* v. *United States*, 242 U. S. 409; *Nash* v. *United States*, 229 U. S. 373; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86.)

Having disposed of the validity of the statute and its clarity in respect to the term "immoral," we turn next to the statutory procedures for carrying out the program. We think that these procedures must also be taken into consideration in determining whether we have a properly drawn statute. Under the terms of the statute, the matter is entrusted to the State Department of Education with the Board of Regents as its head. The Board of Regents, as this Court well knows, consists of thirteen representatives from every section of the State chosen by the Legislature to have charge of education in the State "from the cradle to the grave." Members of the Board of Regents are

not reformers, they come from every walk of life, they represent the highest attributes of a cross section of the New York State citizens. Because of their long term in office, thirteen years, they are not subject to political winds or to other pressures. There is no other body in the State which would represent a more impartial approach to this problem than such Board. They serve without compensation, and devote a great deal of very valuable time to State service. As a matter of fact, the State of New York is fortunate to be able to avail itself of such a body in the administration of such a law as the motion picture law.

Not only has the statute entrusted the Board of Regents with the responsibility of taking educational leadership in the determination of whether pictures are immoral, but the statute has laid down a careful procedure for a review of the action of the Regents. The process is as follows: The owner presents his picture for review, it is examined by reviewers who are permanent, who hold tenure in service and whose experience is gained through the examination of hundreds of thousands of feet of movie film. These reviewers are appointed from certified civil service lists and must meet rigid educational qualifications. If a question is raised by the reviewers, the matter is then available for consideration by the Director of the Division, and from him an appeal lies to the Board of Regents themselves. It is, of course, apparent that the Regents themselves, serving without salary, cannot be expected to examine every picture. If there is any claim that the action of the Regents is arbitrary or contrary to the law, an appeal lies to the courts. The proceeding goes immediately to the Appellate Division with an opportunity for further review by the Court of Appeals.

The fullest protection of the law is accorded. The consolidated viewpoint of the entire people of the State is

tied into the program. If any "liberty" receives due process, this statute certainly accords it in the exhibition of motion pictures.

Conclusion

In conclusion, whether or not this picture is immoral is a question of fact, which has been determined by the Regents and affirmed by the Courts. The term "immoral" has been construed so many times by this Court and other Courts that it is a settled issue. This Court has heretofore determined that statutes which prohibit the exhibition of immoral subject matter are constitutional.

In the words of this Court: "Laws passed for suppression of immorality * * * have been found consistent with due process. * * * The Constitution does not secure to anyone liberty to conduct his business in such fashion to inflict injury upon the public at large or upon any substantial group of the people * * *". *Nebbia* v. *New York*, 291 U. S. 502, 526, 538.

Respectfully submitted,

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APPENDIX A

Education Law of the State of New York
(Revised C. 820, L. 1947)

ARTICLE 3

Educational Department

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PART II

Motion Picture Division

120. Motion picture division continued; organization
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122. Licenses
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• • •

PART II

Motion Picture Division

§ 120. **Motion picture division continued; organization.** There shall continue to be in the education department a motion picture division. The head of such division shall be a director, who shall be appointed by the regents, upon the

recommendation of the commissioner of education. The regents may consolidate such division with the division of visual instruction or may assign to the motion picture division the functions, powers and duties of other divisions, bureaus or officers in the department. The board of regents, upon the recommendation of the commissioner of education, shall appoint such officers and employees as may be needed and prescribe the powers and duties and, within the limits of the appropriations made therefor, fix the compensation of such director, officers and employees. All expenses actually and necessarily incurred in the performance of their duties shall be allowed to such director, officers and employees.

§ 121. **Local offices and bureaus.** The regents may authorize the establishment and maintenance of officers and bureaus for the reception and examination of films and for the transaction of the business of the division in such places as efficiency, economy and the public interests require.

§ 122. **Licenses.** The director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto.

§ 123. **Permits.** 1 "Current event" films. All films exclusively portraying current events or pictorial news of the

day, commonly called news reels, or excerpts from the public press, may be exhibited without inspection and no permits or fees shall be required therefor.

§ 2. **Scientific and educational films.** Such director or, when authorized, such officer shall issue a permit for every motion picture film of a strictly scientific character intended for use by the learned professions, without examination thereof, provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application which shall include a sworn description of the film and a statement that the film is not to be exhibited at any private or public place of amusement.

3. Such director or, when so authorized, such officer may, in his discretion, without examination thereof, issue a permit for any motion picture film intended solely for educational, charitable or religious purposes, or by any employer for the instruction or welfare of his employees, provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application, which shall include a sworn description of the film. No fee shall be charged for any such permit.

§ 124. **Review by regents.** An applicant for a license or permit, in case his application be denied by the director of the division or by the officer authorized to issue the same, shall have the right of review by the regents. The regents, however, by rule may provide that such reviews may be heard and determined by a committee of the regents, the commissioner of education, the deputy commissioner of education or an assistant commissioner of education. A determination upon such review refusing a license shall

be reviewable by a proceeding under article seventy-eight of the civil practice act at the instance of the applicant.

§ 125. **Permits revocable.** Any permit issued as provided in part two of this article or as provided in chapter seven hundred fifteen of the laws of nineteen hundred twenty-one may be revoked by such director or officer authorized to issue the same five days after notice in writing is mailed to the applicant at the address named in the application. Thereafter any such film may be submitted to such director or authorized officer only in the manner provided for license.

§ 126. **Fees.** The director or authorized officer of such division shall collect from each applicant for a license or a permit, except as otherwise expressly provided in part two of this article, a fee of three dollars for each one thousand feet or fraction thereof of original film and two dollars for each additional copy thereof licensed or permitted by him. The revocation or cancellation of any license or permit issued shall not entitle the grantee thereof to the return of any fee paid. All fees received by such director or authorized officer shall be paid monthly into the general fund of the treasury of the state of New York.

§ 127. **Applications.** No license or permit shall be issued for any film unless and until application therefor shall be made in writing in the form, manner and substance prescribed by the education department, and accompanied by the required fee. Such application shall immediately be given a serial number which shall by the producer, owner or applicant be made a permanent part of the principal title portion of the corresponding film and every copy thereof for which the permit or license is applied, in such style and substance as such department shall prescribe.

§ 128. **Licenses and permits void.** Any license or permit issued upon a false or misleading affidavit or application shall be wholly void *ab initio*. Any change or alteration in a film after license or permit, except the elimination of a part or except upon written direction of the director or authorized officer of such division, shall be a violation of this article and shall also made immediately void the license or permit therefor. A conviction for a crime committed by the exhibition or unlawful possession of any film in the state of New York shall *per se* revoke any outstanding license or permit for said film and such director or authorized officer shall cause notice thereof to be sent to the applicant or applicants.

§ 129. **Unlawful use or exhibition.** It shall be unlawful to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel, other than those specified in subdivision one of section one hundred twenty-three, unless there is at the time in full force and effect a valid license or permit therefor of the education department and unless such film or reel shall contain for exhibition upon the screen identification matter in the substance, style and length which such department shall prescribe.

This section shall not be construed to prohibit the making of an executory contract for the sale or leasing of a film or films, provided the film shall have been licensed under the provisions of part two of this article and the license seal attached at the time of delivery.

§ 130. **Posters, banners, et cetera.** No person or corporation shall exhibit or offer to another for exhibition purposes any poster, banner or other similar advertising matter in connection with any motion picture film, which

poster, banner or matter is obscene, indecent, immoral, inhuman, sacrilegious or of such a character that its exhibition would tend to corrupt morals or incite to crime. If such poster, banner or similar advertising matter is so exhibited or offered to another for exhibition, it shall be sufficient ground for the revocation of any permit or license issued by the education department.

§ 131. **Penalty.** A violation of any provision of part two of this article shall be a misdemeanor.

§ 132. **Enforcement; rules and regulations.** The board of regents shall have authority to enforce the provisions and purposes of part two of this article; but this shall not be construed to relieve any state or local peace office in the state from the duty otherwise imposed of detecting and prosecuting violations of the laws of the state of New York. In carrying out and enforcing the purposes of part two of this article, the regents may make all needful rules and regulations.